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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TU MY TONG, Plaintiff and Appellant, v. FRED RUCKER, Defendant and Respondent.	B217961 (Los Angeles County Super. Ct. No. BC385464)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory Alarcon, Judge. Affirmed.

Mazur & Mazur, Janice R. Mazur and William E. Mazur, Jr., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Tu My Tong sued Attorney Fred Rucker for legal malpractice. The trial court entered judgment on a jury's special verdict in favor of Rucker. Tong appeals. We affirm the judgment.

FACTS

In August 2000, Duc Doan borrowed $300,000 (all money figures are rounded) from U.S. Credit Bancorp, Inc. (USCB),[1] secured by a deed of trust recorded against an apartment building on Figueroa Street. Between February and April 2003, Doan signed a series of deeds ostensibly conveying all of his interest in the apartment building to Tong. In August 2003, Doan filed for bankruptcy. Following a legal history which need not be recounted for purposes of the current appeal, the bankruptcy court ruled that Tong owned the apartment building. Meanwhile, Tong sought to refinance the debt on the apartment building, and, in January 2005, she requested a "payoff demand statement" from USCB pursuant to Civil Code section 2943. In November 2006, Tong sued USCB for failing to provide a timely payoff demand statement. Eventually, a jury returned a verdict in favor of Tong and fixed her damages at $190,000. In an opinion issued earlier this year, we upheld the jury's verdict. (See *Tong v. Rone* (June 29, 2010, B210280) [nonpub. opn.].)

Attorney William Brownstein represented Tong at some point during the course of Doan's underlying bankruptcy case. In June 2005, Tong sued Brownstein for alleged legal malpractice during the underlying Doan bankruptcy proceedings. Tong's original attorney in her action against Brownstein did not last, and, in December 2006, Tong retained new counsel, Attorney Fred Rucker, to represent her in the malpractice case against Brownstein. According to the allegations in her complaint in her current malpractice action against Rucker, Tong claims she terminated Rucker on "February 6, 2007." Notwithstanding this claim, Tong and Rucker attended a mandatory settlement conference on February 16, 2007, in her malpractice action against Brownstein. At the

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[1] More accurately, Doan borrowed the money from an original lender, and the loan was later assigned to other entities until the "lender" came to be USCB. For purposes of this appeal, the only relevant holder of the note evidencing the loan is USCB, and we ignore the other loan-related entities. Our references to USCB include its sole officer and shareholder, Michael Rone.

conference, Tong agreed to a settlement. Tong subsequently attempted to repudiate the settlement with Brownstein. However, on April 3, 2007, the trial court granted Brownstein's motion to enforce the settlement. Two years ago, we affirmed the court's order to enforce the settlement agreement between Tong and Brownstein. (See *Tong v. Brownstein* (Aug. 29, 2008, B199596) [nonpub. opn.].)

In February 2008, Tong sued Attorney Rucker for legal malpractice in the course of Tong's earlier legal malpractice case against Attorney Brownstein. Tong's legal malpractice claims against Rucker were tried to a jury in April 2009. Tong represented herself, with the assistance of a Vietnamese interpreter. On April 29, 2009, the jury returned a special verdict which included findings that Tong had failed to prove the causation element of her case-within-a-case claims against Brownstein. Specifically, the jury found that to the extent Brownstein had performed below the standard of care in the Doan bankruptcy proceedings, his acts had not caused Tong any actual economic damage. On May 5, 2009, the trial court entered a judgment on jury verdict in favor of Rucker.

On June 1, 2009, Tong filed a motion for new trial. On July 14, 2009, the trial court denied Tong's motion.

DISCUSSION

Tong contends the trial court erred in denying her motion for new trial because the record demonstrates that the court (1) instructed the jurors they were allowed to discuss the case before they began to deliberate, and then (2) actually allowed the jurors to meet together and confer about the case before submitting the matter for deliberations. We disagree.

" '[A] trial judge is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal. [Citations.] However, we are also mindful of the rule that on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party [citation], including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order

granting a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.' . . . Prejudice is required: '[T]he trial court is bound by the rule of California Constitution, article VI, section 13, that prejudicial error is the basis for a new trial, and there is no discretion to grant a new trial for harmless error.' [Citation.]" (*Sherman v. Kinetic Concepts, Inc*. (1998) 67 Cal.App.4th 1152, 1160-1161, quoting *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) In this case, we have reviewed the entire record and find no grounds to reverse the judgment.

A. The Governing Law

Citing Penal Code section 1122 and *People v. Wilson* (2008) 44 Cal.4th 758, 838, Tong argues that jurors are prohibited from discussing a case until all of the evidence has been presented, the trial court has instructed the jury, and the jury begins to deliberate. Citing another criminal case, *People v. Majors* (1998) 18 Cal.4th 385, 422-423, Tong argues that it is serious misconduct for jurors to discuss a case among themselves before their deliberations begin. Citing still other criminal cases, namely *People v. Cooper* (1991) 53 Cal.3d 771, 835, *People v. Holloway* (1990) 50 Cal.3d 1098, 1108, and *People v. Honeycutt* (1977) 20 Cal.3d 150, 156, Tong provides another rule: juror misconduct raises a rebuttable presumption of prejudice.

We find Code of Civil Procedure section 611 more applicable: "If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express any opinion thereon until the case is . . . submitted to them." In short, it is " 'improper for jurors to discuss a case prior to its submission to them . . . .' " (*City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 429, quoting *Smith v. Brown* (1929) 102 Cal.App. 477, 484.)

B. The Trial Events

Before the parties started presenting evidence, the trial court pre-instructed the jury in accord with CACI No. 100, including the following admonition: "Don't talk to each other about the case until the end of the case and only when all 12 jurors are present in the jury room." The court then immediately gave "a few reasons why that is the rule." The court first explained a different state's view that jurors may talk about the case during the case. The court went on to note that most states and "California definitely" disagree with that rule. The court emphasized the importance of the admonition not to speak about the case until the end of the trial and provided reasons for the rule.

After instructing the jurors not to discuss the case before deliberations, the trial court then instructed the jurors with short comments not to "become educated in the law of malpractice other than the law that you get in this case," and "not to use the internet to find out about the case or do any research because you're only to consider the evidence here and the law that I give you." The trial court then explained to the jurors the way it addressed the issue of juror questions. Again, the trial court explained two differing views, and then stated its rationale for permitting jurors to ask questions during the trial. The court also explained the procedure it used for jurors to ask questions.

Trial sessions in front of the jury were conducted on April 22, 23, 24 (Friday), 27, and 28, 2009. We have reviewed the reporter's transcript of the trial and note that, at every break during the trial, the court admonished the jurors not to discuss the case.

During trial on April 23, 2009, the trial court acknowledged in front of the jury that it had received a number of questions from different jurors and advised the parties and the jury that the questions would be copied, stapled together, and provided to the lawyers to study. The next day, April 24, while defendant Attorney Rucker was testifying, the court allowed several questions from the jurors to be read to him. After a few such questions, the court noted that "one of the jurors thought that . . . many of the questions are duplicative since the jurors [did not] get together and write the questions together." The court then asked the jurors to confer to ensure that their questions were

not duplicative. On more than one occasion, the jury conferred and then submitted questions.

On April 27, 2009, after the court sent the jury to the jury room while the parties conferred about exhibits, the jurors returned with questions for Tong, including, among others, "[H]ow many lawyers represented you in the malpractice suit against Brownstein?" and "[D]id you fire them or did they quit? And if so, why did you fire them or why did they quit." The jury submitted additional questions on April 28 and 29.

On April 29, 2009, at 1:30 p.m., the jury began to deliberate. At 1:55 p.m., the jury reached a verdict. As noted above, the jury found that Tong had failed to prove the causation element of her underlying case-within-a case against Attorney Brownstein. On May 5, 2009, the trial court entered a judgment on jury verdict in favor of defendant Attorney Rucker.

On June 1, 2009, Tong filed a motion for new trial. Tong supported her motion with her own declaration and declarations from two "eyewitnesses," Lai Thon and Bruce Elerding, neither of whom was a juror during trial of her case. Generously construed, the declarations showed that on April 28, 2009, at 3:30 p.m., the court had asked the jury to go to the jury room for a few minutes. On July 14, 2009, the trial court denied Tong's motion for new trial.

C. Analysis

We have read the pages of the reporter's transcript, including the portions cited in Tong's opening brief, and we see no evidence that the trial court suggested to the jurors that it was permissible for them to begin discussing the case before the end of the trial. Tong's argument that the trial court instructed the jurors that it was permissible to discuss the case outside of deliberations is belied by the record. The court did no such thing. Indeed, the court's comments to the jurors were specifically designed to explain why California forbids jurors from discussing a case before deliberations. To the extent the court made comments about "innovations" in other states regarding predeliberations discussions, it did not do so, as Tong suggests, in a context approving of such a practice.

On the contrary, the court's comments came in a context in which it expressly explained why California had concluded such innovations were ill-reasoned.

In the same vein, we also see no indication in the record that any jurors actually discussed the case at any point prior to the beginning of deliberations. The fact that some jurors independently wrote out questions during the trial, and that the court asked jurors to meet to screen out duplicative questions, does not in our view establish that any juror violated his or her duty to refrain from discussing the case prior to deliberations. Even given the most generous of readings, the record shows that the jurors met only to omit duplicative questions; the court did not invite or allow the jurors to discuss the substance of the case.

DISPOSITION

The judgment is affirmed.

O'CONNELL, J.*

We concur:

FLIER, Acting P. J.

GRIMES, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.